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IN THE

Supreme Court of the United States

WILLIAM W. McBOYLE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

No. 552

BRIEF FOR PETITIONER

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SUBJECT INDEX

Opinion of the Court below 1
Jurisdiction 1
Statement of the Case 3
The Facts 6
Specification of Errors 9
Argument and authorities 10
Points urged 10-11
Point 1, Act Strictly Construed 11
Point 2, Language Does not Indicate Crime 12
Point 3, Language, legal and general usage 15
The word "vehicle" 16
The term "motor vehicle" 17
Point 4, Doctrine of Ejusdem Generis 20
Application of Rule 23
Point 5, Debates of Congress 30
Point 6, Special Legislation of Congress 34
Point 7, Conflict of Decisions 38
Conclusion 40
Appendix 43

TABLE OF AUTHORITIES CITED

CASES:

Fasulo v. United States, 272 U. S., 620; 2-13-38
United States v. Noveck, 271 U. S., 201; 2-13-38
First Nat. Bank of Anamoose v. U. S., 206 Fed., 374 3-12-14-22
No. Am. Acci. Ins. Co. v. Pitts, (Ala.) 104 So. 21; 40 ALR, 1171 22
Work v. Braffet, 276 U. S., 560, 566; 30
United States v. Wiltberger, 5 Wheat., 76, 95; 3-12
Hammerschmidt v. United States, 265 U. S., 182; 3
United States v. Chase, 135 U. S., 255; 3
United States v. Lacher, 134 U. S., 624- 628; 13
Todd v. United States, 158 U. S., 278, 282; 13
Donnelley v. United States, 276 U. S., 511; 13
Parman v. Lemmon, 120 Kan. 370 22
Blake vs. National City Bank 23 Wall. 407-321 30
U. S. v. 1st. Nat. Bank Detroit, Minn. 234 U. S. 360;58 L. Ed. 1304 39
Corona Coal Co. v. U. S. 263 U. S. 537 39
Crook v. Harrelson, dec. Nov. 24, 1930 39
Fook, Petitioner, v. White, 264 U. S. 443 39-40

STATUTES:

National Motor Vehicle Theft Act 3-43
Air Commerce Act 35
Kansas Motor Vehicle Stat. 19
Code of Iowa 19
Laws of Delaware 24
Code of Ohio 25
Laws of Michigan 25
Laws of Missouri 25
Code of District of Columbia 26

LAW ENCYCLOPAEDIAS, ETC.

Cyc. Vol. 28 17
Cyc. Vol. 36-1119 21
Cyc. Vol. 39-1125 16
Corpus Juris, Vol. 42, pp. 563-1410 17
Corpus Juris, Vol. 2, p. 299 18
Ruling Case Law, Vol. 25, p. 1081 11
Ruling Case Law, Vol. 25 p. 1083 12
Ruling Case Law. Vol. 19, p. 677 18

DEBATES OF CONGRESS.

HOUSE DEBATES:

58 Cong. Rec. Pt. 6, pp. 5470-5478 31-2-3

SENATE DEBATES:

58 Cong. Rec. Pt. 7, pp. 6433-6435 33

GENERAL ENCYCLOPAEDIAS AND DICTIONARIES.

Standard Dict., Ed. 1928 16
Standard Dictionary, pp. 1618-1619 27
Century Dictionary 17
New International Ency. Vol. 16, p. 337 18
New International Ency. Vol. 1, p. 172 18
Ency. Brittanica 27
Winston's Ency. 1929, Vol. 7 27
Appleton's New. Pract. Ency. 1920, Vol. 4 27

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I

THE OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit was filed August 18th, 1930 (R. 171), and is reported in 43 Federal (2d), 273.

II

JURISDICTION

1. The jurisdiction of this court is invoked under Section 240 (A) of the Judicial Code, as amended by the Act of February 13th, 1925.

2. The judgment of the Circuit Court of Appeals of the Tenth Circuit, here in question, was entered by the

court September 8th, 1930 (R. 177). (Opinion filed August 18th, 1930; R. 171).

3. The indictment in this case, being one under a Federal Statute (R. 2), the National Motor Vehicle Theft Act, and the primary question being one of the jurisdiction of the trial court of the cause of action, this court has jurisdiction to review the decision of the Circuit Court of Appeals, Tenth Circuit, and to determine the question of jurisdiction. This question is especially important as a matter of public interest, as it involves aeroplanes, a new and third method of travel, and the decision will doubtless form a precedent to be followed in construing many other statutes in connection with aeroplanes and aeroplane travel.

In addition, the Appeals Court below was divided in its view, as shown by the majority opinion (R. 171) and dissenting opinion (R. 176).

4. In the following cases this Court assumed jurisdiction and they are cited as authority for the Court to assume jurisdiction in this case:

Fasulo v. United States, 272 U. S. 620; 71 L. Ed., 443. The reasoning of this case, Petitioner maintains, should control in the case at bar. In this case construction of a Federal penal statute was also involved, the question being whether the use of the mails for the purpose of obtaining money by means of threats of murder or bodily harm is a scheme to defraud.

In United States v. Noveck, 271 U. S., 201; 70 L. Ed. 905, construction of a penal statute was also involved, and the same reasoning applied as in the Fasulo case.

The following cases are also very applicable:

First Nat. Bank of Anamoose v. United States, 206 Fed., 374. (This case is in line with the above mentioned authorities, and applies the rules of construction hereinafter discussed in this brief).

United States v Wiltberger, 5 Wheat., 76, 95; 5 L. Ed., 37.

Hammerschmidt v. U. S., 265 U. S. 182; 68 L, Ed. 968.

United States v. Chase, 135 U. S., 255; 34 L. Ed., 117.

It will be noted that the majority opinion of the Appeals Court below in this case, on the question of jurisdiction, cites no parallel cases as authority, but appears to rest entirely on broad similarities of usage between aeroplanes and automobiles, and one or two very general definitions.

STATEMENT OF THE CASE

The question in this case before this Honorable Court is one of jurisdiction of the trial court. The case arose by indictment filed in the District Court of the Western District of Oklahoma, on January 18th, 1928 (R2), in which this petitioner, William W. McBoyle, was jointly charged with one A. J. "Steve" Lacey, alias Pat Sullivan, under the National Motor Vehicle Theft Act, with transporting an areoplane, on October 10th, 1926, from Ottawa, in the State of Illinois, to Guymon, in the Western District of Oklahoma, knowing the same to have been stolen.

The pertinent portions of the Act applicable to this case are as follows:

"408. **Motor Vehicles**—Transportation, Etc., of Stolen Vehicles. This section may be cited as the **National Motor** Vehicle Theft Act. The term

> **'motor vehicle'** when used in this section, shall in-include **an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails;** * * * Whoever shall transport, or cause to be transported, in interstate or foreign commerce, a **motor vehicle,** knowing the same to have been stolen, shall be punished by a fine of not more than $5,000.00, or by imprisonment of not more than five years, or both * * *." (Title 18, Sec. 408, U. S. Criminal Code of Procedure; See Appendix).

It will be noted that the word "aeroplane" does not appear in the Act; nor are any similar words, such as aircraft, airship, or flying machine, used. The legality of the indictment, and consequently, the jurisdiction of the trial court, depends upon the construction placed upon the term "motor vehicle" as used and defined in the Act. In other words, does the language of the National Motor Vehicle Theft Act quoted above include and embrace aeroplanes? The instruction (R. 112) of the trial court to the jury on this point was as follows:

> "It is true that the term aeroplane is not used in this section, but you are instructed the term aeroplane is included in the term 'motor vehicle', as used in this statute."

The majority opinion (R. 171) of the Circuit Court of Appeals for the Tenth Circuit, sustained the contention of the Government and affirmed the trial court on all of the assignments of error, including those raising the question of jurisdiction (R. 150), thus, in effect, holding that the term "motor vehicle" includes areoplanes (R. 174).

Circuit Judge John H. Cotteral dissented from the majority opinion, holding that an aeroplane is not a mo-

tor vehicle within the meaning of the National Motor Vericle Theft Act, and that the trial court was therefore without jurisdiction. (R. 176).

THE FACTS

The detailed facts are not pertinent in considering the question of law before this court, but the following brief statement is made to show the nature of the case.

The transportation of the plane in question took place from October 6th, 1926, to October 10th, 1926, (R. 16), although the indictment was not filed until about a year later when the defendant Lacey was apprehended in Montana with a plane subsequently stolen by him from Minneapolis, Minnesota, (R. 35). He was then returned to Oklahoma under warrant charging him with the illegal transportation of the Ottawa, Illinois, plane on which this case is based. Lacey then related his story, admitting the charge and implicating McBoyle in the transportation of the Illinois plane, which led to petitioner's indictment with Lacey in this case. Lacey later pleaded guilty, and was sentenced to serve a year in the penitentiary at Chillicothe, Ohio, (said sentence to run concurrently with a former sentence from the State of Indiana, (R. 35). The trial of McBoyle, this petitioner, did not come on until the 24th day of May, 1929, at which time Lacey had been released from the penitentiary under both of his sentences, and appeared as a witness in this case. The Government relied almost wholly on Lacey for its testimony against this petitioner. The situation is clearly indicated by the following comment of the trial court to the jury (R. 116).

> "Now, gentlemen, it largely resolves itself into a situation of whether you believe the testimony of the

defendant McBoyle, or whether you believe the testimony of Lacey."

Lacey testified on behalf of the Government that he first met this petitioner, McBoyle, about the 1st of July, 1926; that he was employed by petitioner during the summer as a pilot at $35.00 a week and commission (R. 16); that he stole the plane at Ottawa, Illinois, on October 6th, 1926, and flew it to the petitioner's airport at Galena, Illinois, (R. 17), but states that he did so as the employe of and at the direction of this petitioner (R. 16); that while the plane was being serviced at the port, the petitioner filed off the serial number of the plane (R. 17) and repainted a fitting (R. 18); that he, Lacey, then proceeded West, at the request of petitioner, intending to go to Amarillo, Texas; that he stopped at two or three places en route, and in passing over Guymon Oklahoma, on October 10th, 1926, he noticed a fair and stopped to barnstorm. Some telegrams (R. 21) were there interchanged between Lacey and petitioner, Lacey contending that they had reference to the stolen plane, which is disputed by petitioner (R. 70). Lacey returned to Illinois, leaving the plane at Guymon, and the plane was later returned to Illinois by the owner.

Petitioner in his defense testified that he first met Lacey about the middle of June, 1926, (R. 53), but denies that he ever employed Lacey at all, (R. 57); stated that Lacey brought a plane with him which he claimed was his own, which later turned out to be a plane stolen in Indiana (R. 56), and which he flew during the summer from petitioner's port as a base, on the commission basis customary to transient pilots; that Lacey left his field before October 6th, 1926, (R. 58). Petitioner specifically denied that he knew anything about or had anything to

do with the stealing or transportation of the Ottawa plane, or any other plane, (R. 73). He admitted that Lacey alighted at his port; that his plane was serviced, but denies that he, petitioner, was ever personally about the plane or had anything to do with it, or knew anything about, the changing of any serial numbers or repainting any parts (R. 72); that Lacey advised him and he believed that he was going to McGregor, Iowa, where there was a prospective student pilot (R. 16); that at the request of Lacey, he was instrumental in directing him to some parties where he got a quantity of liquor, which was taken on board his plane at Petitioner's port, (R. 60); that he knew nothing of Lacey's going West, either to Amarillo, Texas, or elsewhere. (R. 73-74); that he understood and thought the word "stock" in the telegrams had reference to liquor (R.70), and his own telegrams had that only in mind, and denies that he ever had any agreement, as Lacey claims, relative to any code or the use of the word "stock" (R. 70). Petitioner further testified that upon his return to Illinois, Lacey explained his taking of the plane at Ottawa as a secret arrangement between him and Bridgeman, the President of the Company, which petitioner accepted as the real facts in the case. (R. 65-66).

It is the contention of this petitioner that he is a victim of the circumstances of having had trouble with Lacey when he left his port about the first of October, 1926 (R. 58); of Lacey's having alighted at his port with the stolen plane; of the exchange of telegrams; and of a malicious attempt on the part of Lacey, by false testimony, to involve him in the alleged crime.

At the close of the Government's evidence, petitioner moved the court that the jury be instructed to find for him, as defendant, on a plea of not guilty (R.48). This

motion, together with a demurrer to the evidence, was again entered at the close of all of the evidence in the case (R. 105), all of which were overruled by the court. The trial was concluded on May 27th, 1929, the jury returning a verdict finding this petitioner, as defendant, guilty as charged in the indictment (R. 4).

Petitioner then filed his motion for new trial (R. 5), which was heard June 29th, 1929, and overruled. He then filed his motion in arrest of judgment on the ground that the indictment did not state a cause of action or show an offense committed against the laws of the United States, and that the court had no jurisdiction of the subject matter of the action or of the defendant, which was also overruled by the court and exceptions allowed, (R. 9).

Thereupon, on the 29th day of June, 1929, said court sentenced the petitioner to imprisonment in the Federal penitentiary for a term of three years, and to pay a fine of $2,000.00 (R. 9).

Thereafter, petitioner appealed to the United States Circuit Court of Appeals for the Tenth Circuit to review the judgment and proceedings of the Trial Court.

As stated above the Appeals court affirmed judgment of the trial court (R. 171), with Circuit Judge Cotteral dissenting on the ground of jurisdiction. In fact, the theory of the Government in this case is clearly indicated by the majority opinion, while the contention of petitioner relative to jurisdiction, is upheld by the dissenting opinion (R. 176).

This Honorable Court, in granting the Petition for Writ of Certiorari to the Appeals Court below, limited consideration to the question of whether the National

Motor Vehicle Theft Act applies to aircraft. The following brief is therefore limited to a discussion of this question of law:

IV

SPECIFICATION OF ERRORS

1. The United States Circuit Court of Appeals, Tenth Circuit, erred in sustaining the legality of the indictment and the jurisdiction of the trial court by holding that the term "motor vehicle," as defined and used in the National Motor Vehicle Theft Act, includes and embraces aeroplanes. (R. 172-174).

(The foregoing Error, to which this hearing is confined, includes the points raised in errors one, two, three, four, five and six (R. 150-151), and 19 (R. 166) assigned in the Court below, and all of which question the jurisdiction of the trial court, and the legality of the indictment.

The jurisdiction of the trial court was raised during the trial of the case by the following motions and demurrers: First, by motion at the close of the Government's evidence, that the jury be instructed to find for defendant on a plea of not guilty (R. 48); second, by renewal of this motion, and by demurrer to the evidence, entered at the close of the evidence of the case (R. 105); third, by motion for a new trial (R. 5); fourth, by motion in arrest of judgment on the ground that the indictment did not state a cause of action or show an offense committed against the laws of the United States, and that the court had no jurisdiction of the subject matter of the action or of the defendant (R. 9). All such motions and demurrers were overruled by the trial court, and exception allowed.)

V

ARGUMENT AND AUTHORITIES

The foregoing Assignment of Error raises the only question before this Court. This assignment is reducible to the following proposition:

THE TERM "MOTOR VEHICLE," AS USED IN THE NATIONAL MOTOR VEHICLE THEFT ACT, DOES NOT INCLUDE OR EMBRACE AEROPLANES, AND THE INDICTMENT DOES NOT STATE A FEDERAL OFFENSE AND IS THEREFORE VOID, AND THE TRIAL COURT IS WITHOUT JURISDICTION

The Theories of the Government and of Petitioner are clearly indicated respectively by the following excerpts from the majority and dissenting opinions of the Appeals Court below in this case:

> "We conclude that the phrase 'any other self-propelled vehicle' includes an aeroplane, a motor boat and any other like means of conveyance or transportation which is self-propelled and is of the same general class as an automobile and a motorcycle." (Majority opinion, R. 174).
>
> "I am constrained to hold that aeroplanes were not meant by the Act to be embraced in the designation of motor vehicles, and that the indictment charged no offense against the Government." (Dissenting opinion, R. 177).

In urging the foregoing proposition, the Petitioner relies upon the following seven points:

1. Being a penal statute, the Act must be strictly construed.

2. The language of the Act does not clearly indicate the crime charged.

3. The language of the Act, in the light of both legal and general usage shows conclusively that aeroplanes were not intended to be embraced in the Act.

4. Under the Doctrine of Ejusdem Generis, the Act can not be construed to embrace aeroplanes.

5. The debates of Congress at the time of the enactment of the law clearly and conclusively show that aeroplanes were not intended to be included in the term "motor vehicle," as used therein.

6. Special legislation of Congress relative to aeroplanes refutes the contention of the Government in this case.

7. The majority opinion of the court below is in conflict with applicable decisions of other circuits, and of the United States Supreme Court, involving the construction of similar penal statutes.

These points will be discussed in their order.

POINT 1.

Being a penal Statute, the Act must be strictly construed.

> "301. General Rules. It has long been the well settled general rule that penal statutes are subject to the rule of strict construction. They will not be construed to include anything beyond their letter even though within their spirit, and nothing can be added to them by inference or intendment."

More correctly it may be said that such laws are to be expounded strictly against an offender and liberally in his favor. This can be accomplished only by giving to them a literal construction so far as they operate penally, or at most, by deducing the intention of the legislature from the words of the act." (25 R. C. L. 1081).

Further commenting Ruling Case Law states:

> "In extension of the letter of the law nothing may be assumed by implication, nor may the mischief intended to be prevented or redressed, as against the offender, be regarded in its construction. Criminal statutes which specifically enumerate acts, or places in which they shall be committed, and make them punishable as offenses, cannot be made to embrace other acts or places merely, because they may be said to be within the reason and policy of the law, for the reason that they are of equal atrocity and of a kindred character. The words of the statute must be such as to leave no reasonable doubt as to the intention of the legislature, and where there is any act and where there is any well founded doubt as to any act being a public offense, it should not be declared such, but should rather be construed in favor of the liberty of the citizen." (25 R. C. L. 1083-1084).
>
> See also U. S. v. Wiltberger, 5 Wheat 76, 5 U. S. L. ed.) 37, and,

First National Bank of Anamoose v. U. S. 205 Fed. 374.

In view of the fact that Congress, in enacting the Act, failed to use the word "aeroplane," or any similar word that indicates an intention to make the Statute applicable to aeroplanes, and since the term "motor vehicle," as will hereinafter be shown, has universally been applied to automobiles and other vehicles running upon the ground, petitioner maintains that the application of the above rule eliminates aeroplanes from consideration in enforcing the act.

POINT 2.

The Language of the Act Does not Clearly Indicate the Crime Charged.

The Act does not contain the word "aeroplane;" neither does it contain any similar words, such as "aircraft," "airship," "flying machine," etc. On the other hand, the specific terms in the Act apply only to automobiles and like conveyances. In order therefore, for an aeroplane to be embraced in the Act, it is necessary to read the word "aeroplane," or some similar word into it by judicial construction of the definition of "Motor vehicle," as contained therein.

The following authorities show conclusively, we believe, that this cannot be done:

"There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statutes. United States v. Lacher, 134 U. S., 624, 628; 33 L. Ed., 1083; 10 Sup. Ct. Rep., 625." (Fasulo v. United States, 272 U. S., 620; 71 L. Ed., 443).

"Statutes will not be read to create crimes, or new degrees or classes of crimes, unless the purpose so to do is plain." (United States v. Noveck, 271 U. S., 201; 70 L. Ed., 905).

"Regard is always to be had to the familiar rule that one may not be punished for crime against the United States unless the facts shown plainly and unmistakably constitute an offense within the meaning of an act of Congress. United States v. Lacher, 134 U. S., 624, 628, 33 L. Ed., 1080, 1083; 10 Sup. Ct. Rep., 625; Todd v. United States, 158 U. S., 278, 282; 39 L. Ed., 982, 983; 15 Sup. Ct. Rep., 889; Fasulo v. United States, 272 U. S., 620, 629; 71 L. Ed., 443, 445; 47 Sup. Ct. Rep., 200." (Donnelley v. U. S., 276 U. S., 511; 72 L. Ed., 678).

This same view in the construction of criminal statutes has long been observed by the Circuit Court of Appeals of the Eighth Circuit.

In the case of United States vs. The First National Bank of Anamoose, the defendant bank was charged with violating Section 239 of the Penal Code, which act made it a crime for "any railroad company, express company, or other common carrier, or any other person" to act as the agent of the seller for collecting money for the sale of intoxicating liquors. The trial court construed the phrase **"any railroad company, express company, or other common carrier, or any other person"** to contemplate and include the First National Bank of Anamoose, which had collected a draft with a bill of lading attached, through the regular course of business. This case is almost identical with the case at bar, so far as general principles are concerned. The case was appealed to the United States Court of Appeals, Eighth Circuit, and Justice Sanborn, in his opinion in the case, comments as follows:

> "(1) The statute creates and denounces a new offense. A penal statute which creates a new crime and prescribes its punishment must clearly state the persons and acts denounced. A person who, or an act which, is not by the expressed terms of the law clearly within the class of persons, or within the class of acts, it denounces will not sustain a conviction thereunder. One ought not to be punished for a new offense unless he and his act fall plainly within the class of persons or the class of acts condemned by the statute. An act which is not clearly an offense by the expressed will of the legislative department before it was done may not be lawfully or justly made so by construction after it is committed, either by the interpolation of expressions or by the expung-

ing of some of its words by the judiciary. Ex post facto construction is as vicious as ex post facto legislation.

"To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of kindred character, with those which are enumerated. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words in search of an intention which the words themselves did not suggest. **United States** v. **Wiltberger,** 18 U. S. (5. Wheat.) 76, 96, 5 L. ed. 37; **United States** v, **Ninety-nine Diamonds,** 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185, and cases there cited,

"The apparent and natural meaning of the terms of a statute is always to be preferred to any curious or hidden significance reached by the reflection and ingenius reasoning of unusually strong and acute minds" **(First Nat. Bank of Anamoose v. United,** 206 Fed. 374.)

The foregoing authorities appear to refute conclusively the Government's contention in this case.

POINT 3.

The Language of the Act, in the light of both Legal and General Usage, Shows Conclusively that Aeroplanes Were not Intended to be Embraced therein.

For convenience, we again quote the definition of motor vehicle as contained in the Act:

"408 * * * The term 'motor vehicle' when used in this section shall include an automobile, automobile truck, automobile wagon, motorcycle, or any

other self-propelled vehicle not designed for running on rails." (Title 18, Sec. 408, U. S. Crim. Code),

The word "vehicle," and the term "motor vehicle," insofar as they apply to conveyances, have been applied universally to vehicles that travel on land, both in their common and legal usage.

The Word "Vehicle"

The following definitions of "vehicle," are pertinent here:

"4. 'Vehicle', as Including All Means of Land-Transportation. The word 'vehicle' includes every description of carriage or other artifical contrivance used, or capable of being used, as a means of transportation on land. Sec. 4, Title 1, of the U. S. Code."

"Vehicle 1. That in or which anything is or may be carried; especially a contrivance with wheels or runners for carrying something. A conveyance as a carriage, wagon or car; **Specific, in Law, any Artificial Contrivance Used or Capable of Being Used as a Means of Transportation on Land."** Standard Dictionary Ed., 1928.

Cyc. states:

"Vehicle. Any carriage moving on land, either on wheels or on runners; * * * " (39 Cyc., 1125.)

The footnote to the above text on vehicles reads as follows:

"The term is rarely applied to water craft and does not therefore apply to a ferry-boat." (Duckwell v. New Albany, 25 Ind., 283-286.)

"Railroad cars which only run on a permanent, continuous track are not 'vehicles' in the ordinary and usual sense of the term." (Baltimore, etc., R. Co. v. District of Columbia, 10 App. Cas.) (D. C. 111, 120.)

The opinion of the court below cites the definition of vehicle" in the Century Dictionary, as follows:

> "F. Vehicle, L. Vehiculum", meaning a 'conveyance, carriage, ship.' It defines the word as, 'Any receptacle, or means of transportation, in which something is carried or conveyed or travels." (R. 172).

The above definition, however, is followed by the following definition:

> "Esp. A carriage or conveyance moving on wheels or runners;" * * *

Definition and use of the term "Motor Vehicle"

This term apparently came into existence with the automobile, and in its legal and common usage has been entirely confined to the automobile and like motor-driven conveyances that travel on the ground.

Volume 28 of "Cyc", copyrighted in 1908, devotes some 30 pages to the subject of "motor vehicles". In this article, the term is used synonymously with the word "automobile", and like vehicles, and is confined exclusively to such conveyances.

In Volume 42 of Corpus Juris, copyrighted in 1927, eight years after the passage of the National Motor Vehicle Theft Act, 843 pages (563 to 1410) are devoted to the subject of "motor vehicles". In the 800 pages of this exhaustive discussion, nothing but automobiles and like conveyances that run upon the ground are discussed or referred to. A cursory examination of each page of the article indicates that the word "aeroplane" was never used in the text nor in the numerous notes on each page. The author seems to assume as a matter of course, that the term "motor vehicle" applies only to automobiles and like conveyances.

Volume 2 of Corpus Juris on the other hand, treats of "Aerial Navigation". An examination of the ten pages of this article and the numerous notes accompanying it, so far as we are able to find, does not disclose the use of the term "motor vehicle" even once. It is simply not thought of in that connection.

In Ruling Case Law, Vol. 19, Page 677, the following index appears: "Motor Vehicles. See automobiles, Vol. 2, p. 1164."

The New International Encyclopedia, in Vol. 16, copyrighted in 1917, devotes 13 pages (337 to 350) to the discussion of the subject of "motor vehicles". It defines the term as follows:

> **"Motor Vehicle (Ger. Motor-Wagon).** A carriage for the transportation of passengers or a truck for transportation of freight, fitted to run on streets and highways without a track, * * * "

The above definition is followed by an exhaustive discussion, both historic and scientific, of automobiles and like conveyances that run upon the ground, with many drawings of automobiles, etc. But there seems to be no reference that would in any way connect the term "motor vehicle" with any form of aircraft.

Volume 1, of the International Encyclopedia, pages 172 to 187, on the other hand, treats of 'Aeronautics", but the term "motor vehicle" is never used therein.

The Air Commerce Act of the United States (Sec. 176-1 to 176-14, Title 49, U. S. Code), approved May 20, 1926, seven years after the passage of the National Motor Vehicle Theft Act, never in any instance makes use of the term "motor vehicle." It uses a terminology distinctively belonging to airplanes, such as "aircraft," "airspace," "airworthiness," "air navigation,' ' "air-

ports," and "navigable airspace." It also has the following provision relative to the words "vessel", and "vehicle:"

> "(a) The navigation and shipping laws of the United States, including any definition of "vessel," or "vehicle," found therein * * * shall not be construed to apply to seaplanes or other aircraft. (Title 49, Sec. 176, U. S. Code.)

In the Statutes of the Various States, the laws applicable to automobiles and like conveyances are invariably listed under the subject of "motor vehicles."

In Kansas, for instance, Chapter 206, Statutes of 1925, begins as follows:

> "Section 1. (a) The term 'motor vehicle,' when used in this act, means any automobile, automobile truck, motor bus, or any other self-propelled vehicle not operated or driven upon fixed rails or track."

In the Code of Iowa, 1927, 251, entitled "motor vehicle and law of Road," a motor vehicle is defined as follows:

> "1. The term 'motor vehicle' shall include all vehicles, propelled by any power other than muscular power except traction engines, road rollers, and such vehicles as are run only upon tracks or rails."

An examination of the statutes of some fifteen or twenty of the states, including Massachusetts and New York, shows that highway regulation of automobiles and like conveyances is treated under the term "motor vehicles," and it is reasonable to conclude that it is likewise true of the other states.

The above definition from Kansas is almost identical with the definition found in the National Motor Ve-

hicle Theft Act, but it could not possibly be construed to apply to airplanes, as the act treats of regulations peculiar to automobiles and like conveyances that use the roads, with no thought otherwise.

The Court below quotes as authority in construing the term "motor vehicle," Corpus Juris, Volume 42, page 609, Sec. 1, (R. 173) which reads as follows:

> "A 'motor vehicle' is a vehicle operated by a power developed within itself and used for the purpose of carrying passengers or materials; and as the term is used in the different statutes regulating such vehicles, it is generally defined as including all vehicles propelled by any power other than muscular power, except traction engines, road rollers, and such motor vehicles as run only upon rails or tracks."

The real meaning of the definition is determined, however, by the authorities on which it is based. An examination of these authorities shows that invariably the subject matter has to do with automobiles or like conveyances that run on the ground. Then too, the definition is followed by 800 pages of data dealing entirely with principles, statutes and decisions concerning automobiles, and like vehicles, and none of which apparently deal with aircraft directly or indirectly.

Usage of the term "motor vehicle" certainly eliminates aeroplanes or aircraft of any kind from classification under the definition of that term in the Act.

POINT 4.

Under the Doctrine of Ejusdem Generis the Act Cannot Be Construed to Embrace Aeroplanes.

The well known rule of construction, "ejusdem generis," is particularly applicable in construing the defini-

tion of "motor vehicle", as used in the National Motor Vehicle Theft Act, for the reason that this definition begins with the specific terms "automobile, automobile truck, automobile wagon, motorcycle," and closes with the general phrase, "or other self-propelled vehicles not designed for running on rails."

The doctrine of "ejusdem generis" is almost universally recognized. It is well defined by Cyc:

> "(11) **Doctrine of Ejusdem Generis.** By the rule of construction known as ejusdem generis, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that if the legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes. The words 'other' or 'any other' following an enumeration of particular classes are therefore to be read as 'other such like,' and to include only others of like kind or character" (36 Cyc. 1119).

This doctrine has long been recognized by the Circuit Court of Appeals of the Eighth Circuit. Section 2 of the syllabus of the opinion by Judge Sanborn, quoted above in the case of the First National Bank of Anamoose vs. United States, is particularly applicable to the case at bar:

> "2. Statutes—Construction—Ejusdem Generis Definition of Crime. The rule that, where general words follow the enumeration of particular classes of persons or of acts, the general words should be

construed to apply to persons or acts of the same general nature or class of those enumerated, is especially applicable to statutes defining crimes and regulating their punishment." First Nat. Bank of Anamoose, v. U. S., 206 Fed 374.

In the case of Parman v. Lemmon, 120 Kan. 370, the court passed upon the construction of a penal statute of that state beginning as follows:

"Any person who shall sell, trade, give, loan or otherwise furnish any pistol, revolver or toy pistol, by which cartridges or caps may be exploded, or any dirk, bowie knife, brass knuckles, slung shot, or other dangerous weapons, * * * "

The syllabus of the above case states:

"Weapons—Dangerous Weapons—Shotguns. In enacting chapter 106 of the Laws of 1903 (R. S. 38-701, 38-702), it was not the intention of the legislature that the words 'other dangerous weapons' contained therein, should include shotguns."

The following case is most applicable:

"This aeroplane as operated by Whitted cannot be called a common carrier of passengers. It cannot be designated **a public conveyance, provided by a common carrier for passenger service only**, as the policy contract contemplated. The connection in which these general words are used with the other conveyances mentioned in the policy contract strengthens this conclusion. The conveyance mentioned in the policy are 'railroad car, steamboat, automobile, omnibus, or cab,' and then follows the more general words or phrase, 'or other public conveyance provided by a common carrier for passenger service only.' **This aeroplane is not a conveyance of the same kind or species** as the others enumerated in the policy contract. **It was used to fly in the air; and the other conveyances enumerated are used on**

land or water." No. Am. Acci. Ins. Co. v. Pitts (Ala.), 104 So. 21, 40 A. L. R. 1171.

It, therefore, clearly appears that the application of the rule to the definition of the term "motor vehicle" in the National Motor Vehicle Theft Act is analogous to its application in the above cases, and that, when applied, the term "motor vehicle" must be confined to automobiles and like conveyances mentioned in the first part of the definition, all of which travel on the ground; and that the word "airplane" cannot be read into, or implied as coming within the meaning of the term "motor vehicle" as used in the act. As indicated by the Alabama case quoted above, there are now three general modes of transportation, by land, by water, and by air. The conveyance used in each is in principle of construction very different from the other two, and the phraseology describing one class certainly cannot be used to include or describe the other class.

Application of this Rule of Ejusdem Generis to the Phrase "Any Other Self Propelled Vehicle"

It is the contention of the Government that the phrase "any other self-propelled vehicle," includes "aeroplanes." In order to sustain this contention under the above rule, it is necessary to place aeroplanes in the same class with automobiles, in construing the statute. The majority opinion of the Appeals Court below, sustains the Government's contention by the following reasoning:

> "Furthermore some meaning must be ascribed to the general phrase "any other self-propelled vehicle," which Congress wrote into the Act. It specifically enumerated all of the known self-propelled vehicles designed for running on land. It used the word "automobile" a generic term, which includes all self-propelled motor vehicles that travel on land

and are used for the transportation of passengers, except those designed for running on rails. 42 C. M. p. 939, Sec. 2.

"We conclude that the phrase "any other self-propelled vehicle" includes an airplane, a motor boat and any other like means of conveyance or transportation which is self-propelled, and is of the same general class as an automobile and a motor cycle."

This conclusion is untenable first, because the history of the phrase shows a long usage in connection with automobile traffic law, beginning as early as 1902, when aeroplanes were unknown.

History of the Phrase. The phrase did not originate with the National Motor Vehicle Theft Act. In the General Statutes of Connecticut, Revision of 1902, we find the following definition of the term "motor vehicle," in traffic laws governing the speed of motors:

"Whenever the term "motor vehicle" is used in this section, it shall include all vehicles propelled by any power other than muscular, excepting the cars of electric and steam railways and other motor vehicles running upon rails or tracks."

This language is substantially the same as in the Act in question, if anything, it is broader and more sweeping, but it could not have been intended to include aeroplanes, for they were not in existence. It applied only to vehicles traveling on the ground. Practically all of the states have statutes defining the term "motor vehicle," in similar language, covering a period of almost thirty years. The following examples will suffice to show this general usage:

The laws of Delaware, 1904-1905, Chapter 124, page 213, defines the term "motor vehicle," as follows:

"Wherever the term 'motor vehicle,' is used in this act it shall be construed to include automobiles, motorcycles and all other vehicles propelled wholly otherwise than by muscular power, excepting cars of electric and steam railways and other motor vehicles running upon rails or tracks. * * *"

The General Code of Ohio, 1910, Chapter 21, page 2303 states as follows:

"Section 6310. The term 'motor vehicle' as used in this chapter and in the penal laws, except where otherwise provided, includes all vehicles propelled by power other than muscular power, except traction engines, motorcycles, road rollers, traction engines, fire engines, police patrol wagons, ambulances and vehicles that run upon rails or tracks."

The term is again defined in the laws of Michigan, 1913, as follows:

"The term 'motor vehicle' as used in this act, except where otherwise expressly provided, shall include all vehicles propelled by any power other than muscular power, except motorcycles, operated by policemen or firemen on official business, traction engines, road rollers, fire wagons, fire engines, police wagons, ambulances and such vehicles as run only upon rails or tracks." (Howell's Michigan Statutes, Vol 2, 1913, page 1147.)

The laws of Missouri, 1913, provide:

"The term, 'Motor Vehicles,' as used in this article, except where otherwise expressly provided, shall include all vehicles propelled by any power other than muscular power, except traction engines, road rollers, fire wagons, and engines, police patrol wagons, ambulances, and such vehicles as run only upon rails or tracks."

Congress, in traffic legislation for the District of Columbia, uses the following sweeping definition:

(a) The term "motor vehicle," means all vehicles propelled by internal-combustion engines, electricity, or steam, except traction engines, road rollers, and vehicles propelled only upon rails and tracks." Code of the District of Columbia, 1929. Chapter 9, Regulation of Traffic.)

It would be quite as logical to include aeroplanes in the above definition, as in the similar definition in the National Motor Vehicle Theft Act, but we do not believe Council for the Government would so contend.

The foregoing statutes, we believe, show conclusively that the phrase, "other self-propelled vehicles not designed for running on rails," as used in National Motor Vehicle Theft Act, was borrowed from the State statutes concerning "motor vehicles," beginning prior to the invention of aeroplanes, and applying invariably and exclusively to automobiles and like vehicles that run on the ground. Even though the phrase is rather comprehensive and broad, usage has defined its limits, and it is not necessary to look for a hidden meaning to give it effect. In the light of the history of this phrase, it is clear that Congress used it in the same sense that the state statutes have used similar phrases since the beginning of the automobile industry, and it certainly cannot be construed to refer to and include aeroplanes.

The conclusion of the court below that the Act enumerates "all of the known self-propelled vehicles designed for running on land," is, we maintain, likewise erroneous and untenable. "Automobile," is simply one of four vehicles named, all apparently of equal importance." The repetition of the word "automobile," as an adjective before the words "truck" and "wagon," is clearly for the purpose of differentiating such vehicles from horse drawn vehicles that perform similar service. The adjective

"motor" would serve the same purpose. The words "automobile, automobile truck," will be found in the Kansas traffic statute quoted under Point 3. There are a number of other vehicles that are as different from any of these four as they are from each other. For example, the large "motor buses," carrying twenty or thirty passengers, and now running on regular schedule over the highways from coast to coast were little known at the time of the passage of the act. No one would think of using any one of the words "automobile, automobile truck, motor wagon, motorcycle" used in the Act in referring to a "motor bus;" and if any one of such words were used, it would not intelligently convey the idea of a "motor bus," to anyone. The same might be said of a hospital ambulance. It is significant that the words "motor bus," appear in the Kansas highway traffic statute of 1925, quoted above under point 3.

There are a number of other words of rather common usage applying to automobiles and like conveyances, such as "motor car," (Ency. Brittanica), "motor carriage," (Appleton's New. Pract. Ency. 1920, Vol. 4), "bus," "car," 'roadster,' 'coupe,' 'phaeton,' 'sedan' 'limousine' 'brougham, (See cut. Standard Dict. p. 1618-1619).

It is obvious, therefore, that Congress intended the phrase "any other self-propelled vehicle not designed for running on rails," to include new or improved vehicles, of the same class that run on the ground but having different usage from those designated, such, as "motor bus," or "ambulance," and to include any new trade or coined names that might be applied to the same or similar conveyances, such as those last mentioned above. No other explanation is necessary to give the phrase legal effect.

The Court below holds in effect that aeroplanes, motor boats and automobiles are of the same class, and that therefore the rule of Ejusden Generis is not violated in holding that the phrase "any other self-propelled vehicle" includes aeroplanes within the meaning of "motor vehicles." It states

> "We conclude that the phrase "any other self-propelled vehicle" includes an airplane, a motor boat and any other like means of conveyance or transportation which is self-propelled and is of the same general class as an automobile and a motorcycle."(R. 174)

This classification is so general as to fall neither within the letter nor spirit of the Act. In fact, it goes to the other extreme and eliminates all limitation, thus rendering the specific words of the definition useless. If it includes airplanes and motor boats, why not Zeppelins and ocean liners. It is much more reasonable to assume that Congress intended that the clearly expressed words of the Act are there for the purpose they express, than it is to hunt for a hidden meaning of the general phrase that in effect completely eliminates any use for the specific words.

The best guide to classification of these vehicles is statutory law and legal and general literature. For example. Corpus Juris, treats of Aeroplanes, under the subject "Aerial Navigation" (2 C. J., 299); of automobiles and like conveyances that run on the ground, under "motor vehicles," and watercraft, under "Admiralty," (C. J. 1248) and "Shipping" (36 "Cyc" 1), The International Encyclopaedia, has a similar classification: See Automobile Vol. 2, p. 432; Aeronautics Vol. 1 P. 172; "Motor Boats" Vol. 16 p. 333; "Motor Vehicle" Vol. 16 p. 337.

The important thing about an aeroplane that differentiates it from all other modes of travel is the fact that it flies,—not that it moves by means of a motor. This fact has given rise to a new body of statutory law, and many new questions of general law. Statutory law, federal and state, invariably treats of these vehicles in three separate classes. In fact practical use forces such separate classification.

The whole situation is well summed up in the Alabama case quoted above, as follows:

> "The conveyances mentioned in the policy are 'railroad car, steamboat, automobile, omnibus, or cab;' and then follows the more general words or phrase, 'or other public conveyance provided by a common carrier for passenger service only.' This aeroplane is not a conveyance of the same kind or species as the others enumerated in the policy contract. It was used to fly in the air; and the other conveyances enumerated are used on land or water." (No. Am. Acci. Ins. Co, v, Pitts (Ala.), 104 So, 21, 40 A. L. R. 1171).

Land travel has its own terminology, such as "wagons", "carts", "automobiles", 'motor vehicles' 'cars,, "trains", etc.; water travel has its own terminology, such as "vessels", "ships", "motor boats", "liners', etc. It remained for the Twentieth Century to develop the first new mode of travel in history,—that by air. This new method of travel is likewise developing a new terminology of its own, such as "aeroplanes", "airships", "flying machines", Zeppelin", etc. It is confined neither to land nor to water in its operations. Colonel Lindbergh used the same aeroplane in crossing the Atlantic that he used in flying over North and South America.

It is obvious, therefore, that the aeroplane can not be classed either with automobiles or motor boats, and is not a "motor vehicle" within the meaning of the Act.

It is contention of the Petitioner, therefore, that under the Doctrine of Ejusdem Generis, the Appeals Court below was in error in holding that the term "motor Vehicle," includes and embraces aeroplanes.

POINT 5

The Debates of Congress at the Time of the Enactment of the Law, Clearly and Conclusively Show That Aeroplanes were not Intended to be Included in the Term "Motor Vehicle," as Used Therein.

This Honorable Court has recognized the value of the debates of Congress in ascertaining the purposes of legislation in the following cases:

> "That such was the purpose is established by the Congressional Debates. 58 Cong. Rec. pt., 5, pp. 4577-4585; 66 Cong, 1st Sess." (Work v. Braffet, 276 U. S. 560, 566; 72 Ed., 700-3).
>
> See also Blake v. National City Bank, 23 Wall. 407-321, 23 L. Ed. 119.

The debates in connection with the enactment of the National Motor Vehicle Theft Act, are of unusual value in construing the statutes, and, we believe, show conclusively that it was not the purpose of Congress to include areoplanes.

Some fifteen or twenty members in the House and Senate took part in the discussion leading up to the enactment of this law, including **Mr. Dyer, the author of the Act.** The House debates appear on pages 5470 to 5578, Vol. 58, Part 6 of the Congressional Record, and the Senate debates appear on pages 6433 to 6435, Vol. 58,

Part 7 of the Congressional Record. An examination of these debates shows that neither the word "airplane" nor any reference to aircraft of any kind is made by any member of Congress in discussing the National Motor Vehicle Theft Act, although a number of the most prominent members, including Mr. Dyer, author of the act, and Senators Cummins, Brandegee and Hitchcock, took part. On the other hand, by actual count, the word "automobile" appears in these debates more than 80 times. Mr. Dyer, the author of the act, opens the debate as follows:

> "Mr. Dyer: Mr. Speaker, and gentlemen of the House, this bill is for the purpose of providing punishment for those stealing automobiles and automobile trucks and taking them from one State to another State" (Con. Rec. Vol. 58, Part 6, page 5470).

In outlining the purpose of the Act, Mr. Dyer states:

> "It provides, gentlemen, for only two things. Section 3 provides for the punishment of a thief stealing a car and transporting it from one state to another. Section 4 provides for the receipt of the stolen car by thieves in another state for the purpose of selling and disposing of it." (Cong. Rec. Vol. 58, Part 6, page 5472).

With regard to the consideration given the bill by the various committees, Mr. Dyer states:

> "This bill has been given very careful consideration by the Committee on the Judiciary. The full committee, with the earnest desire to present to the House a measure that would as far as possible wipe out the numerous stealings of automobiles, gave most careful consideration to the same. Prior to doing so it was considered by a subcommittee of the Committee on the Judiciary, and after its consideration by the full committee and after a number of

meetings changes were made in it from time to time, and the bill as finally agreed upon was introduced by me and given its present number. But prior to this the bill had been considered in substantially the same form for some time, and at a meeting some time ago the Committee on the Judiciary directed that my bill be reported to the House favorably and unanimously."

It will, therefore, be seen that the bill had unusual consideration by the various committees and Mr. Dyer unquestionably states the common view of these committees, namely, that this law applies to automobiles and like conveyances only. And in none of the debates is there even an inference that anything else is intended by the law except automobiles and like conveyances.

As to the reasons for enacting the law, Mr. Dyer further states:

"At the present time there is a great emergency demanding this kind of legislation. In the United States at this time there are in use approximately 6,500,000 automobiles. During the past year the number of thefts of automobiles has been very large throughout the United States, and particularly in some cities of the Middle West. In Chicago 2,500 thefts of this kind have occurred. St. Louis had 2,241 automobiles stolen, and other cities in proportion. * * * It is getting so now that it is difficult for the owners of the cheaper cars to obtain theft insurance, due to the great loss that insurance companies have sustained. During the past year automobile theft insurance on this class of cars has increased 100 per cent. It is automobiles of that price that are generally stolen. Automobile thieves who make a specialty of this crime do not steal many of the higher-priced cars, the reason being, of course, that they are not so easily sold. * * * Thieves have found the

automobile field one in which they can reap huge harvests, due to the fact, no doubt, that there are so many automobiles now in use in the United States." (Cong. Record, pp. 5470-5471).

Other members spoke as follows:

"Mr. Reavis: Bearing in mind that the offense defined by this measure is the transportation of a **stolen automobile** from one State to another,' * * * " (Cong. Record, Vol. 58, part 6, p. 5472).

"Mr. Bee: Another suggestion that occurs to me is why single out automobiles? I make no appeal merely because it is an automobile, for the automobile is the vehicle of everybody. But why should a man be permitted to take a carload of cattle and transport them from Texas to Missouri and have the authorities go through the slow process of extradition by the governor before he can be brought back into the State of Texas? Why should we not include a carload of grain that might be stolen, or a bale of cotton, or a carload of hogs, or hundreds of other things that might be mentioned, * * * " (Cong. Record, Vol. 58, part 6, p. 5474).

"Mr. Cummins: I ask unanimous consent for the present consideration of the bill (H. R. 9203) to punish the transportation of stolen motor vehicles in interstate or foreign commerce."

"Mr. Smoot: Let the bill be read.

* * *

"Mr. Cummins: This is a House bill, and the Senate committee accepted in the main the work of the House. I see no substantial objection, however, to the point made by the Senator from Connecticut. The practice is to steal an automobile close to a State line and run it across the State line. The first section is intended to punish anyone who does that thing, knowing the vehicle to have been stolen. The further practice is, if possible, to dispose of the ve-

hicle to some other party, confederate or otherwise, when it gets across the State line, and section 4 is for the purpose of punishing a man who barters or sells or disposes of the property with intent to deprive the owner of the possession thereof, or if he conceals it knowing it to have been stolen. I think that would probably embrace every case that could be reached.

"Mr. Hitchcock: I realize that what the Senator says is true, but it seems to me a large number of automobile thefts are chiefly for the purpose of sale; most of the men who steal automobiles sell them; it is a regular business. If every sale must be under a certificate and must be registered, without any regard to interstate commerce or passing from one State to another, it seems to me it might be possible to put a stop to that illegitimate business." (Cong. Rec. Vol. 58, Part 7, pages 6431 and 6435)

The foregoing comments are particularly significant and valuable in construing the Act for these reasons: it clearly appears that the Act was given unusual consideration by the various committees, the reasons advanced apply wholly and only to automobiles and like conveyances, mostly to automobiles or "cars", and there is no disagreement among the members on this point.

On the other hand, none of the reasons for enacting this rather emergency legislation applied to airplanes then or now, and Congress certainly did not think of it in that light or intended that it should so apply.

POINT 6.

Special Legislation of Congress, Relative to Aeroplanes, Refutes the Contention of the Government in this Case.

The Air Commerce Act (Section 176-1 to 176-14, Title 49 of the U. S. Code) was enacted and became effective in May, 1926, more than four months before the alleged crime in the case at bar took place.

This act is of great importance in the construction of the National Motor Vehicle Theft Act.

First, an examination of its language and of its provision shows conclusively that Congress never intended to include aircraft in the conveyances covered by the National Motor Vehicle Theft Act. The term "motor vehicle" does not occur in it even once. The word "vehicle" is used only once, and that is for the negative purpose of stating that an airplane is not to be considered a vehicle in the navigation and shipping laws. This definition is as follows:

> "Sec. 7. **Application of Existing Laws Relating to Foreign Commerce.** (a) The navigation and shipping laws of the United States, including any definition of 'vessel' or 'vehicle' found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft." (See Sec. 176-7, Title 49, U. S. Code.)

The purposes of the Act are very broad, and include the following:

> "(a) To encourage the establishment of airports, civil airways, and other air navigation facilities. * * *
>
> "(c) To study the possibilities for the development of air commerce and the aeronautical industry and trade in the United States and to collect and disseminate information relative thereto and also as regards the existing state of the art.

"(c) To investigate, record, and make public the causes of accidents in civil air navigation in the United States" (Sec. 176-2, Title 49, U. S. Code).

Under Section 176-9 of the Act, such terms as the following are defined: "Aircraft", "public aircraft", "civil aircraft", "airport", "emergency landing field", "air navigation facility", "civil airway" and "airman".

The Act also provides for Federal regulation not only of aircraft, but of airmen.

Section 176-3 of the Act reads in part as follows:

"(176-3). Regulatory powers; registration and rating of aircraft; examination and rating of airmen and air navigation facilities; air traffic rules; issue, suspension and revocation of certificates; procedure on suspension or revocation:

"(a) Provide for the granting of registration to aircraft eligible for registration. * * *

"(b) Provide for the rating of aircraft of the United States as to their airworthiness. * * *

"(c) Provide for the periodic examination and rating of airmen serving in connection with aircraft of the United States as to their qualifications for such service."

From the foregoing it will be seen that Congress considered the airplane as a separate and distinct means of transportation from navigation upon the sea and from transportation upon the land, and has consequently created a distinct body of law to control it and to develop it.

There is another distinction that must be considered in the light of the passage of the Air Commerce Act and

similar legislation. Up to this time, at least, it appears that such laws as the National Motor Vehicle Theft Act and other sections of the so-called Dyer Act, such as the White Slave Act, etc., apply only to persons or things that are under the direct control of the states; the purpose of all such statutes is to assist the states in those instance where it is difficult to enforce the state laws of grand larceny in the states, because of the difficulties involved by the transportation of such stolen vehicles into other states. This is clearly shown by the debates of Congress hereinbefore quoted.

In the case of aircraft, the national government has assumed jurisdiction of such means of transportation, and is enacting regulatory laws over both airmen and aircraft by way of inspection, examinations, licenses, etc. There is therefore no need for such a law as the National Motor Vehicle Theft Act in connection with the aircraft industry; and there will not be unless a time should come when so many planes are stolen and transported between states as to become a menace that the states through their grand larceny statutes cannot control.

The Air Commerce Act shows conclusively that Congress considers aircraft as an entirely separate class of vehicles from automobiles and like vehicles that run on the ground.

This situation, together with the control and regulation thereof by the Federal Government, should, it appears, eliminate aeroplanes from consideration as a motor vehicle within the purvue of the National Motor Vehicle Theft Act.

POINT 7.

The majority Opinion of the Court Below Conflicts with Applicable Decisions of the United States Supreme Court, and of other Circuit Courts, Involving the Construction of Similar Penal Statutes.

An examination of the majority opinion of the court below shows that the portion of the opinion holding that an aeroplane is embraced within the term "motor vehicle" is based on a rather loose definition of the word "vehicle" (R. 172), and of "motor vehicle" as defined by Corpus Juris, Volume 42, Page 609, R. 173, and upon the similarity of the purpose of the aeroplane and automobile. The opinion does not cite a case where this or other courts have passed upon a parallel situation in the same way.

On the other hand the following cases involving the construction of other penal statutes, petitioner believes, sustain his contention in this case so fully that they should have controlled the decision.

Fasulo v. United States, 272 U. S., 620; 71 L. Ed., 443.

United States v. Noveck, 271 U. S. 201; 70 L. Ed., 905.

First Nat. Bank of Anamoose v. U. S., 206 Fed., 374.

The pertinent portions of the above decisions have been quoted under point 2 herein. Attention is also directed to the following decisions which are applicable to this case:

"The conviction is very strong that if Congress intended to remove restrictions only from those who had half white blood or more, it would have inserted in the act the words necessary to make that intention clear; that is we deem this a case for the appli-

cation of the often expressed consideration, aiding interpretation, that if a given instruction was intended, **it would have been easy for the legislative body to have expressed it in apt terms.** Farrington v. Tennessee, 95 U. S. 679, 689, 24 L. ed. 558, 561; Union National Bank v. Mathews, 98 U. S. 621, 627, 25 L. ed. 188, 189; Tompkins v. Little Rock & Ft. S. R. Co. 125 U. S. 109, 127, 31 L. ed, 615, 624, 8 Sup Ct. Rep. 762; United States v. Lexington Mill Co. 232 U. S. 399, 410, ante, 658, 662, 34 Sup. Ct. Rep. 337" (United States v. First National Bank of Detroit, Minnesota. 234 U. S. 260; 58 L. Ed. 1304)

"But the words of the statutes are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases." (Corona Coal Company v. U. S. 263 U. S. 537; 68 L ed 431)

"We are inclined to agree with this view; but, in any event the statute plainly relates only to the wife or children of a naturalized citizen, and we cannot interpolate the words "native born citizen" without usurping the legislative function." (Shung Fook, Petitioner v. White, as Commissioner. 264 U. S. 443; 68 L. ed. 781.)

See also Crook, Collector of Internal Revenue v. Harrelson, (decided Nov. 24. 1930); 75 L. ed. 50, See conclusion of this brief for excerpt.

Petitioner therefore maintains that the Court below erred in that its decision is contrary to the foregoing decisions.

CONCLUSION

In conclusion, Petitioner respectfully calls attention to the following excerpt from the very recent opinion of Mr. Justice Sutherland (November 24, 1930), in the case of Crooks, Collector of Internal Revenue v. Harrelson, et al:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But the application of the principle so nearly approaches the boundry between the exercise of the judical power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter."

In the light of the above authority and similar authorities cited throughout this brief, Petitioner submits that the dissenting opinion of Circuit Judge Cotteral, in the Appeals Court below, correctly states the law applicable to this case: He states:

> "It would have been a simple matter in enacting the statute to insert as descriptive words, airplanes, aircraft, or flying machines. If they had been in the legislative mind, the language would not have been expressed in such uncertainty as "any other self-propelled vehicle not designed for running on rails." The omission to definitely mention airplanes requires a construction that they were not included. Furthermore, by excepting vehicles running on rails, the meaning of the Act is clarified. These words indicate it was meant to be confined to vehicles that **run** but not on rails, and it did not extend to those that **fly**. Is it not an unreasonable view that airplanes fall within the description of

self-propelled vehicles that do not run on rails? The question is its own answer.

The rule of **ejusdem generis** has special application to this statute. General words following a particular designation are usually presumed to be restricted so as to include only things or persons of the same kind, class, or nature, unless there is a clear manifestation of a contrary purpose. 25 R. C. L. pp. 996-7. The general description in this statute refers to vehicles of the same general class as those enumerated. We may assume an airplane is a vehicle, in being a means of transportation. And it has its own motive power. But is an airplane classified generally with "an automobile, automobile truck, automobile wagon, or motor cycle?" Are airplanes regarded as **other types of automobiles and the like?** A moment's reflection demonstrates the contrary. * * *

It is familiar knowledge that the theft of automobiles had then become a public menace, but that airplanes had been rarely stolen if at all, and it is a most uncommon thing even at this date. The prevailing mischief sought to be corrected is an aid in the construction of a statute. 25 R. C. L. 1016.

I am constrained to hold that airplanes were not meant by the Act to be embraced in the designation of motor vehicles, and that the indictment charged no offense against the defendant.".

Petitioner respectfully submits therefore that the National Motor Vehicle Theft Act does not apply to or include aeroplanes, that the indictment states no offense against the defendant and is void, and that the trial court was without jurisdiction; that the Appeals Court below erred in its majority opinion, in finding that the Act does apply to aeroplanes, and in sustaining the

indictment, and the jurisdiction of the trial court, and that its decision should be reversed and the case dismissed.

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APPENDIX

408. Motor Vehicles—Transportation, Etc., of Stolen Vehicles. This section may be cited as the National Motor Vehicle Theft Act. **The term 'motor vehicle' when used in this section, shall include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails;** the term 'interstate or foreign commerce' shall include transportation from one state or territory, or the District of Columbia, to another state, territory, or the District of Columbia, or to a foreign country, or from a foreign country to any state territory, or the District of Columbia. **Whoever shall transport, or cause to be transported, in interstate or foreign commerce, a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000.00, or by imprisonment of not more than five years, or both.** Whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000.00, or by imprisonment of not more than five years, or both. Any person violating this section may be punished in any district in or through which such motor vehicle has been transported or removed by such offender; (Title 18, Sec. 408, U. S. Criminal Code of Procedure).